Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 176.

W. A. ARTHUR and JOHN C. WARE, partners as W. A. Arthur & Co., Plaintiffs in Error,

vs.

TEXAS AND PACIFIC RAILWAY COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

Statement.

Brief for plaintiffs in error not having been received, we subjoin the following brief statement in this case:

This suit was originally brought in the United States Circuit Court for the Western District of Arkansas, Texarkana division. The amount involved is $2,605.53, being the value of fifty bales of cotton destroyed by fire while on the platform of the Union Compress Company at Texarkana, Texas, on the 19th day of September, 1900, for which cotton, plaintiffs in error had received a bill of lading from the Railway Company to transport the same to Utica, N. Y.

The bill of lading contained the usual "fire clause" and another authorizing the carrier to compress the same for his convenience,

and exempting it from responsibility for deviation or unavoidable delays occasioned thereby.

Plaintiffs alleged that this suit is one arising under the laws of the United States, the defendant being a corporation created by laws of Congress.

The plaintiffs alleged that the Railway Company under a partnership and traffic agreement with connecting carriers was authorized to give a bill of lading for the cotton through to destination, and that by virtue of its arrangements with other carriers, held itself out to be a carrier from Texarkana to Utica, and represented itself to be such carrier for said cotton. It also alleged that the provision exempting the railway company for loss by fire was void because (1) it was received by plaintiffs under duress, (2) because it was unreasonable, (3) because it was without consideration; that the rate charged for the services was the regular rate, and the plaintiffs had no option to receive any other form of bill, and that they did not assent to it. They also alleged that the cotton was received by defendant September 17, 1900, on the platform of the Union Compress Company: that immediately after the cotton was received by the defendant, the defendant delivered it to the Union Compress Company as its agent to have it compressed for the convenience of the defendant railway company; that the platform was not a proper place to store the cotton; that the Compress Company as agent for the defendant had failed to provide a safe place for such storage, and to keep the same in proper order; and also that said cotton was destroyed by fire on the 19th of September, 1900.

Defendant pleaded as defense the "fire clause" in the bill of lading, and also the clause relating to compressing the cotton.

The answer admitted that defendant was authorized to execute the bill of lading, but denied that it was a partner with connecting parties. It also denied that the freight rate charged was the only one between Texarkana and Utica, N. Y., denied that no option was given plaintiffs to ship the cotton without the "fire clause," and denied that it acted as agent for connecting lines in making the bill of lading, except to guarantee the through rate of freight.

It denied that it delivered the cotton into the custody of the Compress Company, but alleged that it was delivered to said company by the plaintiffs, and was tendered to the defendant on said platforms of the compress company by plaintiffs, and denied that the compress company was its agent for the purpose of compressing

cotton, and denied also the acts of negligence set up in the complaint; denied that the cotton was received by defendant to be shipped under the bill of lading, and alleged that its liabilility was limited to its own line of railway; and that it was not liable for any loss or damaged sustained which did not occur on its own railway. Defendant further pleaded that it neither owned or controlled any line of railway in the state of Arkansas, that its entire line was in Texas, and that the compress is located a few hundred yards west of the Texas line. In its amended answer, defendant charged that the compress company was an independent contractor, to whom was intrusted the compression of the cotton before its delivery to defendant, and which acted independently of defendant, and was not under or subject to its control.

The facts proved beyond dispute were: That in accordance with a custom prevailing in Texas and in the Southwest, the plaintiffs delivered fifty bales of cotton to the Compress Company on or about the 12th day of September, 1900, for which it received tickets from the Compress Company, acknowledging such receipt (Rec., 21, 22, 23. For a statement of the usual course of proceedings at the Compress see Rec., pp. 42-44.). That on the 17th day of September, the plaintiffs took the tickets to the railway company and asked for and received a bill of lading from Texarkana to Utica, N. Y. (Rec., pp. 13, 14, 15). That on the 19th of September, the cotton, being on the platform of the compress company and not having been compressed, it was burned, the fire being caused by a spark from a passing locomotive; that the compress company was an independent corporation, distinct from any railway, whose business was to compress cotton and to care for it while in its possession (Rec., p. 57, *et seq.*) That the railway company had not in any way, whether by word or act, constituted said compress company its agent for any purpose whatever (Rec. *passim.*). That the railway company had no control or interest in said compress company, or its business or its management, or as to protection against fire, and also that at no time had the cotton been in the railway company's actual possession (Rec., 43, 69).

It was also proved that the Texas Railroad Commission had issued an order requiring railway companies to issue bills of lading when Compress company receipts were presented therefor and that defendant in error had made a rule directing its agents to carry out the said order of the Commission (Rec., p. 90).

Statement by Circuit Court of Appeals.

A more succinct statement of the facts was made by the Circuit Court of Appeals, to which court the writ in this case was issued, namely (Rec., p. 112):

"This is an action instituted by plaintiffs in error against the defendant in error to recover $2,605.53, the value of fifty bales of cotton, alleged to have been delivered to the defendant company by plaintiffs at Texarkana, Texas, to be transported to Utica, New York. The defendant company, a railroad corporation in the State of Texas, had its depot station in Texarkana, on the Texas side, the State line between Texas and Arkansas running through said city.

The defendant company had no line of railway from Texarkana to Utica, New York; but had a traffic arrangement for the division of revenues between it and connecting carriers between Texas and Utica. The defendant company had authority to give a bill of lading for the shipment of cotton made over the through line, the rate of shipment from Texarkana to St. Louis being 60 cents per hundred pounds, and from there to Utica 25 cents, making in the aggregate 85 cents. The petition alleged that the defendant company held itself out as a common carrier for such transportation.

The Union Compress Company was an independent corporation, engaged in the business, at Texarkana, of compressing cotton delivered by shippers at said point for transportation. Its platforms for such purpose were on the Arkansas side of the State line. According to the usage of such business, which prevailed in that place, as at other shipping points in Texas and Arkansas, when cotton was brought in by shippers, it was unloaded at the platforms of the Compress Company and a receipt taken therefor from said last-named company by the shipper, which he would carry to the agent of the railroad company, who would take the same up and issue, based thereon, a bill of lading to the shipper. The Compress Company retained possession of the cotton until such time as it could compress the same, and when compressed it delivered the same on board the cars of the railroad company.

The bill of lading in this case contained the following stipulation: 'That neither The Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to or destruction of said cotton by fire, nor for any loss thereof or damage thereto by causes beyond its control.' It contained the further stipulation that: 'Each carrier over whose route the cotton is to be carried hereunder shall have the privilege, at its own cost, of compressing same, for greater convenience in handling and forwarding, and shall not be responsible for deviation or unavoidable delays in procuring such compression.'

Two days after the cotton was so left upon said platform, it was destroyed by fire, in connection with a large amount of cotton belonging to other shippers, with which it had been mingled. The

fire was caused by sparks communicated to some part of the quantity of cotton on the platform from a passing engine of another railroad company."

After reciting the allegations of the pleadings, it continues:

"The evidence tended to show that the cotton while on said platform was not properly safeguarded against accident or destruction by fire, and that the servants of the Compress Company perhaps did not keep sufficient watch over the cotton to prevent its destruction in the event of fire being communicated to it by railroad engines passing said platform.

The Railroad Commission of the State of Texas had adopted and maintained in force the following rule in reference to the receipt of cotton by railroads in Texas located on cotton compress platforms:

'When cotton is tendered to railroad companies upon compress platforms, which is situated on the track of such railroad companies, it shall be the duty of the railroad companies to take charge of and receipt for such cotton in the same manner and on the same terms as they would receive and receipt for cotton when taken at its own depot or platform erected for such transactions; provided, however, that the shipper or the compress company shall in such cases assume the additional risk of insurance involved by such act of the railroad company.'

Pursuant to said regulation the defendant railroad company adopted rule 11, covering substantially the requirements of said regulation.

The plaintiffs were cotton buyers at Texarkana; and had for some time prior to the shipment in question been shipping cotton on like arrangements with the defendant company, and were familiar with the usages that obtained at said place in respect of such shipments."

On defendant's motion, the Court instructed the jury to return a verdict for defendant, and judgment thereon was duly entered. Plaintiffs sued out a writ of error to the Circuit Court of Appeals for the Eighth Circuit, which Court affirmed the judgment. The case is now brought before this Honorable Court by writ of error to said Circuit Court of Appeals.

The assignments of error appear in the record at pages 122, 123.

ARGUMENT.

The stipulations in the bill of lading that Defendant should not be liable for the loss or destruction of the cotton by fire, nor for loss or damage thereto by causes beyond its control, or not occurring on its own line, and that in having the same compressed it should not be responsible for deviation or unavoidable delays, are all valid and binding upon the Plaintiff in this case.

The validity of the fire clause in identically the same kind of a bill of lading, and for the same fire that destroyed the Plaintiff's cotton, was sustained by the Circuit Court of Appeals of the Fifth Circuit, in *Cau vs. T. & P. Ry., 113 Fed., 91 ;* s. c., *194 U. S., 427.*

In that case Jovite Cau obtained from the T. & P. Ry. a bill of lading for a certain number of bales of cotton, to be transported from Texarkana, Texas, to New Orleans, Louisiana. The bill of lading provided that the Railway Company should not be liable for damage to or destruction of the cotton by fire, and it was claimed that the stipulation in the bill of lading was invalid because it had not been agreed to by plaintiff, and he did not, in fact, know that the bill of lading contained such an exemption. The cotton, at the time of its destruction, was in the possession of the Union Compress Company, to which it had been delivered to be compressed, and that Company had obtained insurance on it for the benefit of the Defendant, it being the custom of that Company to effect insurance for the benefit and in the name of each particular railroad receiving cotton at its compress.

The Circuit Court of Appeals affirmed a judgment in favor of the Railway Company, sustaining the validity of the fire exemption clause, and on appeal to the U. S. Supreme Court that Court says :

" It is well settled that a carrier may limit his common law liability. York Mfg. Co. v. Ry. Co., 3 Wall, 107. But it is urged that a contract must be upon a consideration other than a mere transportation of the property, and an option and opportunity must be given to the shipper to select under which, the common law or limited liability, he will ship his goods. If this means that the carrier must take no advantage of the shipper, or practice no deceit upon

him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law, the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it and this is the option or opportunity which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper, and there can be no stipulation for the exemption by the carrier, which is not just and reasonable in the eye of the law. Inside of that limitation, the carrier may modify his responsibility by special contract with the shipper, and the bill of lading limiting the liability constitutes such a contract and knowledge of the contents by the shipper will be presumed."

It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Mfg. Co. vs. Railway, 3 Wall, 107.* In response it was said:

"The second proposition is answered by the fact that there is no evidence that the consideration was not given for the stipulation. The Company, probably, had rates of charges proportioned to the risk they assumed from the nature of the goods carried, and the expectation of loss by fire must necessarily have effected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made. In other words the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate, which was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common law liability of the roads."

In Hutchison on Carriers, Section 240, it is said:

"Every man of ordinary intelligence knows that no individual or company, engaged in the business of carrying to distant places, now undertakes to carry his goods subject to the old common law liability of the carrier. He knows, moreover, that bills of lading are given, not only in evidence of receipt of the goods, but as expressing direct notice that they will be carried on certain terms. Knowing this, he cannot be wilfully blind and plead ignorance, when it was his duty to know, and knowing, in such cases, is assenting. If it was his intention to hold the carrier to his common law liability he should have said so, and have either declined to employ him, or have sued him for his refusal, after tendering a reasonable sum for his services and risk."

If the clause in the bill of lading exempting the Railway Company from liability for loss by fire is valid, then the stipulation that the Defendant should not be liable for loss of the cotton by causes beyond its control is equally valid and binding on the shipper.

The uncontradicted testimony in this case shows that the Railway Company had no control whatever over the Compress Company. The Compress Company was engaged in the business of receiving, storing, compressing and shipping cotton, and in doing that it acted independently of the Railway Company. Its methods, in handling, compressing and loading the cotton on the cars was entirely independent of any management or control by the Railway Company. Its employees were not under the control nor direction of the Railway Company. Neither did the Railway Company have the right, power or authority to direct the employees of the compress company in the manner of doing their work, or of handling, storing or protecting the cotton on its platform, nor in providing facilities for fighting fire. The loss of the cotton in question did not occur after the voyage began, but it occurred before the Defendant received the possession of the cotton and at a time when the cotton was not under its control. Besides, the contract expressly stipulates that in having the cotton pressed the Defendant should not be responsible for deviation or delay.

The authority that sustains the validity of one of the stipulations in the contract will sustain the validity of all of them, because it cannot be said that any of them are unreasonable, or such as Defendant did not have a right to make.

While the shipper ordinarily would have the right to insist on the Railway Company receiving and transporting his property under his common law liability, he could only compel the Railroad Company to transport to the end of its line. He would have no right to demand the bill of lading for through shipment of the cotton, beyond the line of the initial carrier, on a common law liability *Railway vs. Sharp, 40 S. W., 71 ; Ry. vs. Hurst, 67 Ark., 407 ; Exp. Co. vs. Welcome, 29 S. W., 34.*

The fifty bales of cotton in this case was on the platform of the Union Compress Company and the Plaintiffs desired to ship the same to Utica, New York. They filled out a bill of lading on blanks that were furnished them by the Defendant and carried same to the agent who signed it. They knew of all the stipulations in the bill of lading, but made no objection to them at the time.

It is also uncontradicted that Defendant had a different and

higher rate of freight from Taxarkana to Utica, N. Y., by which they would have accepted the cotton for shipment without any limitation as to its liability. This rate was never used because it was so much higher than the rate charged Plaintiffs that shippers never availed themselves of it, it being $1.37 per hundred pounds and the rate charged Plaintiffs being 85 cents per hundred pounds. But, as was said in *York Mfg. Co. vs. Ry., supra* :

" Be that as it may, the considerations expressed in the bill of lading was sufficient to support the entire contract."

The Compress Company was not the agent of the Defendant Railway Company.

Plaintiffs in error contend that although the stipulations in the bill of lading may be valid and binding on them, yet the Defendant would be liable because they say the cotton was destroyed by the negligence of the employes and agents of the Defendant.

To sustain this theory, they undertake to make the Compress Company and its employes the agents of the Defendant, and to show that the Compress Company was negligent in not having its platform enclosed and in not having a sufficient number of water hydrants, and in not having sufficient number of men employed and the failure of those who were employed to extinguish the fire. It is a well recognized rule of law that a Railway Company will not be permitted to contract against liability for its own negligence. With that limitation, there in no restriction upon the right of the Defendant to make the contract in question. But was the alleged negligence of the Compress Company chargeable to Defendant? We think not.

The Plaintiff had been engaged in the business of cotton buyers at Texarkana for a number of years. They directed that all their cotton should be placed on the platform of the Union Compress Company, where it could be classified by their classifier. The course of dealing which had been pursued for a number of years, and with which Plaintiffs were evidently familiar, was that when the owner of the cotton desired to ship the same, he would carry receipts of the Compress Company to the Railroad Company's agent, and exchange them for the bill of lading; that the Railroad Company would then instruct the Compress Company to press the cotton and would give it directions on which cars the same

should be loaded. The Compress Company would then take out insurance to protect the Railroad Company against legal liability for loss of said cotton by fire. It would press the cotton and load it on the cars of the Railway Company. Until that was done, the Railroad Company had no control or management of the cotton. It was a matter of convenience to all parties. In this particular instance, the same course was pursued, and before the cotton was pressed it was destroyed by fire. The cause of its destruction was beyond the control of the Defendant, and was not through its negligence, and under the terms of the contract between it and the Plaintiffs, it is not liable or responsible for such destruction.

In *Mo. Pac. vs. McFadden, 154 U. S., 156*, the Court holds that notwithstanding the Railroad Company may have given a bill of lading for the goods, it is not liable for their destruction or for damage to same, until it has actually received possession. The Court says:

"The elementary rule is, that the liability of a common carrier depends upon the delivery to him of the goods which he has to carry. The rule is thus stated in the text books: 'The liability of common carrier begins when the goods are delivered to him or his proper servants, authorized to receive them for carriage' (Redf. Carriers, 80). 'The duties and the obligation of the common carrier with respect to the goods, commenced with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty of the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other. And until it has become imposed upon the carrier by delivery, he cannot be held responsible for them' (Hutchinson on Carriers, 82)."

In this case, Plaintiffs in Error carried receipts which it held from the Compress Company for the cotton, and delivered the same to the Defendant-in-Error, and procured the bill of lading introduced in evidence, in which it was stipulated that the Defendant-in-Error would not be liable for loss of said cotton by fire, nor for the loss or destruction of same, by causes beyond its control. Both these stipulations are valid and binding, under the authorities hereinbefore referred to. Plaintiffs in Error seek to avoid said stipulations and agreement by showing that the cotton was destroyed through the negligence of the Compress Company, and they then seek to hold the Railroad Company liable for the omissions of the Compress Company, on the ground that it had made the Compress Company its agent.

We submit, however, that the sole ground upon which the principal is held liable for the acts or negligence of his agents, and the master of those of his servants, is based upon *the right to direct and control the action of the agent or servant, in the scope of his employment.* The evidence in this case being uncontradicted and conclusively showing that the fire was not occasioned by the negligence of the Defendant in Error or any of its servants, the sole ground upon which its could possibly be held liable for the destruction of the cotton would be that the Compress Company and its servants were the agents of the Defendant in Error, and that the Defendant in Error had the right to control and manage its said agents in the scope of their employment, or, in other words, to control and manage them, with respect to the character of their buildings, number of men to be employed, appliances for extinguishing fire, and the manner of doing their work. Unless the Defendant in Error had this right and authority over the Compress Company's employes it cannot be held liable for their acts or omissions.

On this branch of the case, the evidence is undisputed and uncontradicted that the Defendant in Error had no such control or authority over the Compress Company or its servants. It could not have made different arrangements for handling the cotton, the employment of a greater number of men, or the provision of additional appliances for extinguishing fires. There is There is absolutely no evidence that the Defendant in Error had any such right or authority, but on the contrary, the undisputed testimony shows that the Compress Company acted independently of the Railway Company, and selected and provided its own platform and appliances for storing cotton, its own process for pressing the same, and its own appliances for extinguishing fire, and the Railway Company had no authority or right to make any change, or in any way or manner whatever direct or control the Compress Company or its servants in the manner of doing the work, or of providing appliances or places for the work.

The facts in the case of *Martin vs. St. L., I. M. & S. Ry. Co., 55 Ark., 510,* are very similar to those in this case. The opinion of the Supreme Court of Arkansas is an able one, and questions involved in this case are discussed with great ability. The Court there decided:

"In this case the Union Compress Company exercised a distinct and independent employment. It was engaged in the business of compressing cotton. It received cotton indiscriminately from the

owners for compression, and gave them a receipt for it, and stored it as it saw fit. At the time of the fire it had stored for compression at the north end of Main Street 3,900 bales of cotton, of which the Defendant and the Little Rock & Memphis Railway Company had executed bills of lading for 2,660 bales; the Defendant for 1,460, and the Little Rock & Memphis Railway Company for 1,200. It does not appear who held the receipts of the Compress Company for the remaining 1,240 bales. None of it, it seems, was stored for compression in the first instance by either of the railroad companies mentioned. Their bills of lading were severally executed by them after the cotton had been stored and receipted for by the Compress Company. The course of conduct pursued by the Defendant with respect to this cotton was: when the owner requested it, it gave bills of lading in exchange for the receipts of the Compress Company, and immediately notified the Compress Company of the fact, and directed it to press and put the cotton on the cars for shipment. The cotton was not actually delivered to the Defendant for shipment until it was pressed; neither was it understood that it should be. There was no evidence tending to prove that the Defendant exercised any control over the cotton until it was loaded upon its cars, or over the place where it was kept until it was placed upon the cars. It assumed no care or custody of it. All that it acquired was the right to the ultimate possession, which passed to it by the original depositors transferring to it the receipts of the Compress Company."

While it is true that cotton belonging to Martin & Co. was stored in the warehouse near by, it is easy to see that the Railway Company would have been liable if the cotton for wbich it had given a bill of lading had been in its possession, and that such cotton originated the fire that spread to and destroyed the cotton belonging to Martin & Co. The Supreme Court, however, held that the Railway Company was not in possession of the cotton and did not control it, and was not, therefore, liable for the acts of negligence of the Compress Company.

In the opinion of the Circuit Court of Appeals in this case it is said (Rec., p. 116):—

"In the view we take of the effect of the fire exemption clause, it is not necessary to determine the question discussed by respective counsel, as to whether or not the defendant railway company should be held to the acceptance of the cotton under its common law obligation as a carrier beyond the limits of its own line, as the non-liability for the loss by fire would apply in either event.

"To avoid this obstacle to a recovery, the final contention of counsel for plaintiff in error is, that the railroad company in fact received from them the cotton and turned it over to the Compress

Company for compression, as matter of its own convenience in shipping; and that the Compress Company at the time of the fire held the cotton as the agent of the defendant in error; and, therefore, the negligence of the Compress Company is imputable to the carrier.

"The railway company did not, as alleged in the petition, first receive the cotton from the shipper and then turn it over to the Compress Company. On the contrary, according to the universal custom which prevailed throughout the southwest, the cotton when brought in for the merchant buyers was unloaded upon the platform of the Compress Company, which receipted therefor to the shipper, who then took the receipt to the railroad company at its station and exchanged it for the bill of lading. Under the regulation made by the Railroad Commissioners of Texas, the railroad company had no discretion in the matter of issuing a bill of lading in exchange for the receipt given by the Compress Company to the shipper. It cannot be maintained, however, that because of this arbitrary regulation the Compress Company became the agent of the railroad company for the custody and care of the cotton, so as to render the latter liable for injury thereto through the negligence of the former. The doctrine of *respondeat superior* rests upon the right and duty of the principal to direct and control the conduct and action of the imputed agent. Any regulation, prescribed by an agency of the State, which would undertake to impose a pecuniary liability upon one person for the conduct or act of a third party, who is an independent actor, would contravene fundamental law.

Where the party sought to be held responsible as master for the negligence of the servant is without the authority to direct the time and manner of doing the work, or to select or direct the employees engaged therein, the doctrine of respondeat superior had no application. In short, to fix this obligation of accountability upon the party as master, he must have the right to direct the manner in which the business shall be done, 'not only shall be done, but how it shall be done' (citing cases).

'The rule that prescribes the responsibility of principals, whether private persons or corporations, for acts of others is based upon their power to control. If the master cannot command the servant, the acts of the servant are clearly not his. He is not the master, for the relation implied by that term is one of power—of command; and if the principal cannot control his agent, he is not an agent, but holds some other or additional relation. In neither case can the maxim respondeat superior apply to them, for there is no superior to respond.'

From this has resulted the established doctrine that where one renders a service to another, representing the will of his employer only in the result of his work, and not as to the means, he is a contractor and not a servant" (citing cases).

There was no Delivery of the Cotton to the Railway Company.

The proof in this case is uncontradicted that there was no actual delivery to the Defendant. It had no control over the cotton, and no right to handle it, and had nothing else to do with it, until it was loaded on the cars.

In *St. L., I. M. & S. vs. Com. Ins. Co., 139 U. S., 223*, the appellee had sued and obtained judgment for loss of cotton by fire. The cotton that was sued for was not covered by a bill of lading. The cotton was on the platform of the Union Compress Company, where it had been placed by Smith & Company, and was insured by the appellee, but the appellant had not executed a bill of lading for it. It had given a bill of lading for other cotton on the platform and it was sought to hold the appellant liable because the cotton it had given a bill of lading for was exposed to fire, and was not protected by any covering, and it was very dry weather, and the Railroad Company had failed to remove it. The Court held that the failure to remove the cotton was not the proximate cause of the fire and exonerated the Railroad Company on that account. It was sought by appellee, however, to hold the Company liable on the ground that it had possession of a large number of other bales of cotton for which it had given a bill of lading and it was sought to make the Railroad Company liable on the ground that the Compress Company was the agent of the Railroad Company. The cotton was in the possession and under the control of the Union Compress Company, and upon premises over which defendant Railway Company had no control. The Supreme Court, after disposing of the other questions, says :

"The next question is how far the Railway Company's liability in this action is affected by the fact that it issued bills of lading for other cotton forming part of the same mass accumulated in the street? The course of business was this : The Compress Company received the cotton from its owners, gave them warehouse receipts for it and placed and kept it, as it saw fit, in its sheds or in the adjoining street. The Railway Company, whenever the owners requested, gave them a bill of lading in exchange for warehouse receipts of the Compress Company. After doing this, the Railway Company gave notice to the Compress Company and directed that Company to put the cotton on the cars addressed accordingly ; and the Compress Company then insured the cotton in behalf of the Rail-

way Company, and put the cotton on the cars. There is nothing else in the case which has any tendency to show that the Railway Company had or exercised any control or custody of the cotton, or of the place where it was kept by the Compress Company, before it was put upon the cars of that Company. The Railway Company evidently neither considered itself, nor was it considered by the Compress Company as having assumed any responsibility for the care or custody of the cotton until it had been insured in its behalf and loaded upon its cars. The evidence warranted, if it not require, did the inference that the bills of lading were issued merely for the convenience of all parties, and with no intention of making any change in the actual or legal custody of the cotton until it was loaded."

In this case the evidence went further and showed conclusively and without contradiction that the Railway Company did not have the possession or control of the fifty bales of cotton which were burned.

In *California Ins. Co. vs. Union Compress Company, 133 U. S., 387*, so much relied upon by plaintiffs in error, under a similar arrangement between the railway companies and the Compress Companies and the Insurance Company, certain cotton was placed on platform of the Union Compress Company at Little Rock, and the owners of the cotton had taken tickets of the Compress Company and delivered them to the Railway Company and recived bills of lading in lieu of the tickets. The Railroad Company then gave directions to load the cotton and the Compress Company had it insured for the benefit of itself and those for whom it held the cotton in trust. The policies providing, however, that a change in possession of the cotton would void the insurance. Before the cotton was loaded on the cars it was destroyed by fire and the insurance companies sought to escape liability by showing that there had been a change in the possession of the cotton. It showed that the owners of the cotton had surrendered their receipts obtained from the Compress Company and obtained a bill of lading from the Railroad Company, and it was therefore contended that the Railroad Company was in possession of the cotton. On that point, however, the Supreme Court says :

" As to the suggestion that by the bills of lading the possession of the cotton was transferred to the Railroad Company and that the policy was voided thereby, the answer is, that the cotton was still in the hands of the plaintiff, in its actual possession and upon its premises. At most, the railway companies, by acquiring the receipts of the plaintiff and issuing bills of lading for the cotton, took

only constructive possession of it; and the plaintiff, retaining actual physical possession of it, did not lose any element of possession necessary to give it the right to effect insurance for its own benefit, and as the bailee or agent for the protection of the railway companies. All that the railroad companies acquired was the right to ultimate possession which passed to them by the transfer to them, by the original depositors, of the cotton receipts, given by the plaintiff."

The Compress Company was a Contractor for whose negligence Defendant in error cannot be held responsible.

The contract was to transport the cotton from Texarkana, Texas, to Utica, New York. The compression of the cotton was a collateral and independent undertaking of the Union Compress Company, and the injury did not result from the acts called for or rendered necessary by the contract.

Defendant in error did not contract or agree with plaintiff in error to put the cotton in proper condition for transportation, but only reserved the right to do so, without rendering it liable for deviation or unavoidable delays. The case is, therefore, easily distinguishable from *Bank vs. Express Company, 93 U. S., 174*, and that line of cases holding that if the injury results directly from the acts called for or rendered necessary by the contract, and whilst such contract is being executed, the employer is liable for the acts of the independent contractor, the same as if he himself had performed such acts. It was therefore held, in Bank vs. Express Company (*supra*) that, notwithstanding the fact that the Express Company had employed the Railway Company to transport the money to its destination, the Railway Company was in the performance of the very act that the Express Company had contracted to perform, and therefore, notwithstanding the independent undertaking of the Railway Company, the Express Company was liable.

The Union Compress Company was engaged in a different and independent business to that of the defendant in error. The defendant in error was engaged in the business of a common carrier. The Union Compress Company was engaged in the distinct business of preparing cotton for shipment, of compressing the same, and loading it on cars of Railroad Companies. In so far as loading the cotton on the car is concerned, its business was similar to

that of stevedores, who engage in the business of loading and unloading ships, and other water carrying craft.

In *Dwyer vs. National Steamship Company, 4 Fed., 493,* it appeared that Walsh Brothers, stevedores, were employed by the National Steamship Company to load and unload cargoes from the steamships of the line, at so much per ton. They had taken off the tarpaulin from the hatchway and removed several sections of the grating, in order to facilitate their laborers in loading the cargo. The removal of the grating was charged to be negligence that resulted in the death of Dwyer. It was held that the stevedores, Walsh Brothers, were independent contractors, and that their men, at work on the cargo, were not servants of the defendant, and that the Steamship Company was therefore not liable for their acts.

In *Rankin vs. Merchants & Miners Transportation Company, 73 Ga., 229,* it appears that the wife was suing for the death of her husband, which occurred by reason of the loading of a ship of the transportation company by the stevedore and his servants. In holding that the transportation company was not liable for the negligence of the stevedore, the Court said:

"It will thus be seen that all which was done by the company was to employ and pay the contractor or stevedore (to use the technical name) to do the job of loading the ship, and to furnish for the ship's use on such occasions, a gang-plank, which, in consequence of the manner in which the job was done, the numbers and rapidity with which the barrels of resin were rolled upon deceased, proved inadequate for that special occasion. If the manner of rolling down the barrels had not been so rapid, it is not alleged that the unhappy incident would have followed; indeed, the inference is clear, from the whole declaration, that it would not. Surely, it cannot be contended that the mere employment of the stevedore to do the job, made the company liable. Such a man, we understand to be one whose occupation is to load and unload vessels in port; in other words, a contractor or jobber for special business, ready to be employed by anybody in his line."

In the above case, it was held that the doctrine of "*respondeat superior*" did not apply, because neither the transportation company or its agents had ought to do with the servants of the stevedore. It had no control of them, and the stevedore and his servants were therefore not the agents or servants of the transportation company.

The suit of the plaintiffs in error is based upon the contract expressed in the bill of lading which was introduced in evidence.

It was alleged that the defendant in error undertook the transportation of the cotton to Utica, New York, and that immediately after the cotton was received by the defendant in error, to be shipped to Utica, New York, it delivered the same into the custody of the Union Compress Company, and made said Compress Company its agent for the purpose of having said cotton compressed for the convenience of the defendant in error, in handling the same, and that the Union Compress Company was negligent in the maintenance of its compress platforms and in failing to have the necessary apparatus for fighting fire, and in the failure of its servants to extinguish the fire (Rec., p. 3). It is not alleged that the Union Compress Company was performing any part of the contract between plaintiff in error and defendant in error. The sole ground on which the complaint seeks to make the defendant in error liable for the negligence of the Union Compress Company is that the Compress Company was the agent of the Railway Company. This, the uncontradicted evidence shows, is not true. On the contrary, the uncontradicted evidence shows that the Union Compress Company was engaged in compressing cotton and loading the same on the cars of the Railroad Companies and held itself out and was at all times ready to perform this service for any one that desired to engage it.

If the defendant in error is to be held liable at all for the destruction of the cotton of the plaintiffs in error, under the allegations of the complaint, it can only be held liable upon the ground that the Compress Company was the agent of the defendant in error. It cannot be held liable for deviation or delay in the shipment, because it was expressly stipulated and agreed by plaintiffs in error and defendant in error, that defendant in error could have the cotton compressed.

In the two cases above cited, it was held that the stevedores, who exercised the independent business of loading and discharging cargoes from ships in port, were not the agents of the steamship companies, although such companies had employed and contracted with the stevedores to perform that service. We can see no reason why the same rule should not apply in this case. The Union Compress Company was engaged in the business of compressing and loading cotton. The most that can be said is that the defendant in error contracted with it to compress and load all cotton on its cars. It looked to the Compress Company for the result only, and did not exercise any control or management of the Compress Company or its servants in the manner or means of doing the work. As was

said in *Martin vs. Railway, 55 Ark., 510*, the Compress Company was an independent contractor, and the Railway Company was not liable for its negligence in handling or storing the cotton for which the Railway Company had given a bill of lading.

See also *H. L. Edwars & Company vs. Texas Midlond R. R. Company, 81 S. W., 800*, wherein the Court said :

"Appellee is not liable, and appellants are not entitled to recover, unless appellee had possession or control of the cotton at the time it was destroyed by fire ; and as the undisputed testimony shows that such was not the case, the judge ruled correctly in directing a verdict for the defendant."

And *St. Louis, Iron Mountain & Southern Railway Company vs. Knight, 122 U. S., 83*, in which Mr. Justice MILLER, delivering the opinion of the Court, and speaking of the nature and effect of a bill of lading, said :

"It is an instrument of a two-fold character. It is at once a receipt and a contract. In the former character, it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel, In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver."

In the opinion of the Circuit Court of Appeals in this case it is said (Rec., p. 117) :

"The Compress Company was a separate, independent contractor. It provided its own platform, its own machinery, its own employees, and determined for itself the manner and time of preparing the cotton for shipment. The right of the railroad company to thus have it prepared was recognized by the contract in the bill of lading. The actual custody and care of the cotton, until compressed and delivered on the cars of the carrier, remained with the Compress Company. This was the usage of the business in such shipments, well understood between the parties. It was *haec est conventio*, as much as if written into the bill of lading.

"The giving of such bill of lading under such circumstances does not render the carrier liable until it had actually taken possession of the cotton described" (quoting from *Pollard v. Vinton, 105 U. S., p. 8*, and citing the *Missouri Pacific Railway Company v. McFadden, 154 U. S., 155*, and other cases.

And the doctrine is applicable to transportation contracts made in that form by railway companies and other carriers by land as well as by sea.

It was not optional with the Railroad Company whether or not it would receive the cotton or execute a bill of lading for same while on the platform of the Union Compress Company, because they were required by law to do that, and that was so, without reference to the character of the platform, whether it was safe or not, enclosed or unenclosed, whether provided with facilities for fighting fire or not, and regardless of the number of laborers employed. The Railroad Company had nothing to do with this, had no control over it and had no option whether it would receive the cotton there or not. The law compelled it to receive it at that point and give a bill of lading for it. But the same law that compelled it to do so very justly provided that the additional risk of insurance involved by so receiving the cotton at such point should be assumed by the shipper.

On this branch of the case, the fact that the cotton was not destroyed while being compressed is important. Evidently, the cause of the destruction of the cotton was from sparks emitted from a Cotton Belt locomotive, pulling a heavy freight train, that passed along the south side of the Compress Company's platform. The wind was from the south, and carried the heavy volume of smoke from the Cotton Belt locomotive into the compress plant, and, as soon as the locomotive had passed that point, the wind, blowing from the south, cleared away the smoke, and it was found that the compress was on fire. That, and the absence of the nozzel from the hose, and of the manager at his noon-day meal, were matters over which Defendant had no control or management whatever, and were additional risks involved in having the cotton on that particular platform, and under the law was additional risk of insurance, that was very justly placed on the shipper and not on the Railroad Company.

Appellants cite the case of *Lancaster vs. Mer. Cot. Comp. & Stor. Co., 14 S. W., 317*, on opinion by the Supreme Court of Tennessee, in which it was held that the Railway Company was liable for the destruction of the cotton whilst on the platform of the Compress Company for the purpose of being compressed.

The Supreme Court of Tennessee, however, is one of the few American Courts that hold that the stipulation in bill of lading exempting the carrier from loss by fire is invalid, unless supported by a separate or independent consideration. See *Ry. vs. Gilbert, 12 S. W., 1018*. This holding, however, is directly in conflict with that of the U. S. Supreme Court, and especially of the Supreme Court

of Texas. *Railway vs. Sherwood, 84 Tex., 30; T. & P. Ry. vs. Richmond, 94 Tex., 575,* and later decisions of the Supreme Court of Arkansas. *Ry. vs. Sharpe, 40 S. W., 781; Ry. Co. vs. Hurst, 67 Ark., 407.* It is also in conflict with the great weight of authority, both English and American.

Plaintiffs in Error were not Under Duress when they Asked for and Received the Bill of Lading.

The testimony offered by defendant in error showed that a bill of lading without limitation as to loss by fire could have been obtained by pursuing the proper course, but, necessarily at a higher rate ($1.37). Witnesses for plaintiff in error testified that they did not know of such a rate, and acknowledged that they had not asked for it.

The fact seems to be, and this is most probable, that having obtained for many previous shipments of cotton bills of lading in the precise form of the one here involved, they followed their usual course, one which they had employed for years, and with which they were familiar, and received precisely what they expected to receive—a bill of lading for their fifty bales of cotton in the usual form. Authorities upon this question have already been cited and quoted from in this brief *(supra).*

The Judgment should be Affirmed.

It appearing clearly from the evidence that defendant in error is sued as a common carrier, the claim being based on a bill of lading; that plaintiffs in error were not under duress when they entered into the contract; that the cotton was not at anytime in the actual or constructive possession of the Railway Company; that at the time of its destruction the cotton was in the exclusive possession of the Compress Company, over which company, its agents and servants, the Railway Company had no control whatever, and for whose negligence it was in no way responsible, the direction of the trial court to the jury to find a verdict for the defendant was right and its action should be approved by this Court.

Respectfully submitted,

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